

United States Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, VA 22202-3513

CEW

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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Cancellation No. 30,109

Royal BodyCare, Inc.

v.

Miracle Minerals, Inc.

Before Hohein, Hairston and Walters, Administrative
Trademark Judges.

By the Board:

This case comes up now on the motion of petitioner, Royal BodyCare, Inc., for summary judgment. Petitioner seeks to cancel respondent's Registration No. 2,164,015 on the Principal Register of the mark MAGICAL for "calcium and magnesium dietary supplement," in International Class 5. Respondent's registration issued June 9, 1998, based upon an application filed May 27, 1997. Petitioner asserts that there is no genuine issue of material fact that petitioner has priority of use of its mark, MAGICAL, for "calcium and magnesium dietary supplements," over respondent's registered mark and that a likelihood of confusion exists.

Both parties have briefed the motion. Petitioner submitted various exhibits in support of its motion.¹ Respondent submitted an affidavit of its president, Roger Gunderson, with exhibits, in opposition to the motion.

Petitioner contends in its motion that the parties' marks and goods are identical; that, "in failing to admit or deny the allegations contained within [petitioner's] Petition to Cancel U.S. Trademark Registration No. 2,164,015 and Petitioner's First Requests for Admissions to [respondent], the Registrant has admitted the allegations contained therein"; and that, therefore, no genuine issues of material fact exist. Respondent argues, *inter alia*, that petitioner's allegations are "unsupportable."

A party is entitled to summary judgment when it has demonstrated that there are no genuine issues as to any material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of

¹ Those of petitioner's exhibits that are not merely copies of papers already filed in this case are not supported by a declaration or affidavit and, thus, are of limited value. Also of limited value, is the copy submitted by petitioner of respondent's purported answers to petitioner's interrogatories because the document is not signed by respondent.

the nonmoving party. See *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); and *Old Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). The evidence must be viewed in a light most favorable to the nonmovant, and all justifiable inferences are to be drawn in the nonmovant's favor. *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); and *Opryland USA, supra*.

We begin by noting that respondent is proceeding *pro se*, through its president, in this case before the Board. Regardless, both parties are required to follow the appropriate procedures and rules of practice for a cancellation proceeding before the Board.

Considering respondent's answer to the petition to cancel, we find that respondent has failed to clearly admit or deny the salient allegations of the petition regarding priority and likelihood of confusion. Rather, respondent contends, essentially, that because its mark is registered, respondent has "the legal right to the exclusive use of the mark MAGICAL" To the extent that respondent believes that its registration is immune to challenge by a prior user of a confusingly similar mark, respondent is mistaken. Respondent appears to misunderstand the nature of trademark

rights and the scope of protection afforded by a federal registration.²

Because petitioner has not submitted with its motion any evidence establishing its use of its mark, we must look to the purported admissions made by respondent. Petitioner submitted with its motion a copy of the requested admissions sent to respondent along with evidence establishing that the requested admissions were mailed on July 18, 2000 and were received by respondent on July 21, 2000. Although petitioner expressly relies in its summary judgment motion upon respondent's failure to respond to the requested admissions, respondent does not mention the requested admissions in its response to petitioner's motion, nor does respondent ask for relief from its failure to respond to the requested admissions.

Thus, we conclude that respondent did not respond to petitioner's requested admissions. The requested admissions are deemed to be admitted by respondent since respondent neither responded to petitioner's request nor

² Respondent asserts its reliance on the Act of 1881, which was repealed by the Trademark Act of 1946, as amended, 15 U.S.C. 1051 *et. seq.* Further, rights in a mark in the United States arise upon proper use of that mark, under both common law and the Trademark Act of 1946. See 15 U.S.C. 1051(a). Upon federal registration, the registered mark has a constructive first use date of its application filing date. See 15 U.S.C. 1057(c). A registered mark is subject to cancellation on the grounds of priority of use and likelihood of confusion within five years from the date of registration. See 15 U.S.C. 1064.

objected thereto within thirty days after the date of service of petitioner's request for admissions. See FRCP 36(a) and *Trademark Trial and Appeal Board Manual of Procedure (TBMP)*, Section 411.01.

The facts deemed admitted by respondent include the following relevant facts:

Respondent has used the mark MAGICAL on calcium and magnesium dietary supplements;

Respondent's first sale in interstate commerce of such goods under the MAGICAL mark was May 21, 1997;

Petitioner uses the mark MAGICAL as a trademark in interstate commerce on calcium and magnesium dietary supplements; and

Petitioner's first such use of its mark is prior to respondent's commencement of its use of the mark MAGICAL in connection with the sale of its product.

In view thereof, we find that petitioner and respondent are using the identical mark, MAGICAL, in connection with the identical goods, calcium and magnesium dietary supplements; and that petitioner has priority of use of the mark MAGICAL on these goods.

In conclusion, we find there are no genuine issues of material fact regarding either petitioner's priority of use or that a likelihood of confusion exists between the parties' identical marks for identical goods. Petitioner's

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motion for summary judgment is granted and respondent's
registration will be cancelled in due course.